Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
MARC SOBEL	)	WT Docket No. 97-56
	)	
Applicant for Certain Part 90 Authorizations in the Los Angeles Area and Requestor of Certain Finder's Preferences	)	
	)	
MARC SOBEL AND MARC SOBEL D/B/A AIR WAVE COMMUNICATIONS	)	
	)	
Licensee of Certain Part 90 Stations in the Los Angeles Area	)	

APPEARANCES

Robert J. Keller on behalf of Marc Sobel; Aaron P. Shainis, Lee J. Peltzman, Barry A. Friedman and Scott A. Fenske on behalf of James A. Kay, Jr.; and Charles W. Kelley, Gary P. Schonman, William H. Knowles-Kellett, John J. Schauble, and D. Anthony Mastando on behalf of the Wireless Telecommunications Bureau and the Enforcement Bureau,[1] Federal Communications Commission.

DECISION

Adopted: November 20, 2001 **Released:** January 25, 2002

By the Commission: Commissioner Martin concurring in part, dissenting in part, and issuing a statement.

I. INTRODUCTION

1. This decision modifies an Initial Decision by Administrative Law Judge John M. Frysiak concluding that Marc Sobel lacks the requisite qualifications to be a Commission

[1] The Enforcement Bureau was established effective November 8, 1999. See News Release FCC Reshapes for the Future (Oct. 26, 1999). Its responsibilities include serving as trial staff in formal Commission hearings. It has participated in this proceeding in lieu of the Wireless Telecommunications Bureau beginning in November 1999.

licensee of Part 90 land mobile stations. Marc Sobel, 12 FCC Rcd 22879 (ALJ 1997). We find that Sobel transferred control of some of his facilities in the land mobile service without Commission authorization and that he lacked candor about the status of these facilities in a sworn affidavit. We modify the initial decision to the extent that we conclude that it is appropriate to limit the sanctions imposed to Sobel's facilities and applications on the 800 MHz band.

II. BACKGROUND

2. This proceeding is an offshoot of WT Docket No. 94-147, which the Commission designated for hearing to determine whether James A. Kay, Jr., a licensee of land mobile radio facilities under Part 90 of the Commission's rules, complied with those rules and whether he possesses the character qualifications to remain a Commission licensee. James A. Kay, Jr., 10 FCC Rcd 2062 (1994), modified, 11 FCC Rcd 5324 (1996). Kay was ordered to show cause why his licenses should not be revoked or cancelled, why he should not be ordered to cease and desist from certain violations of the Communications Act, and why an order for forfeiture should not issue.

3. In designating that proceeding for hearing, the Commission found that: "Information available to the Commission also indicates that James A. Kay, Jr. may have conducted business under a number of names. . . . . We believe these names include . . Marc Sobel dba Airwave Communications." 10 FCC Rcd at 2063 ¶ 3. Accordingly, the Commission designated for hearing in WT Docket No. 94-147 11 licenses held in the name of Marc Sobel. Id. at 2080. On January 25, 1995, Kay moved to enlarge, change, or delete issues, alleging in part that the Commission erred in designating the 11 Sobel licenses for hearing. WTB Exh. 44 at 4-5. Subsequently, on February 23, 1996 and March 6, 1996, the Wireless Telecommunications Bureau itself filed pleadings indicating that the relationship between Kay and the Sobel licenses was unclear and needed to be explored in a nonadjudicatory investigation. After the ALJ certified the matter, the Commission deleted the Sobel applications from WT Docket No. 94-147. James A. Kay, Jr., 11 FCC Rcd 5324 (1996).

4. On June 11, 1996, the Bureau, pursuant to 47 U.S.C. § 308(b), sent a letter of inquiry to Sobel asking him to detail his business association with Kay. SBL Exh. 6, Att. 9. Sobel responded by disclosing a document entitled "Radio System Management Agreement and Marketing Agreement," dated December 30, 1994, (Management Agreement) under which Kay managed 15 conventional SMR stations in the 800 MHz band licensed to Sobel.[2] SBL Exh. 3, WTB Exh. 39. Based on the terms of the Management Agreement, the Commission found a substantial and material question of fact as to whether Sobel has transferred control of the stations covered by the Management Agreement to Kay without Commission approval in violation of 47 U.S.C. § 310(d). Marc Sobel, 12 FCC Rcd 3298 (1997). Sobel was ordered to show cause why the Management Agreement stations (of which there were then only 13), and 15 stations

[2] The Specialized Mobile Radio Service (SMR) was established on the 800 MHz band to provide radio dispatch communications to customers within local areas. SMR stations are classified as either conventional or trunked. See amendment of Part 90, 10 FCC Rcd 7970, 7974-75 ¶¶ 3-4 (1994); Amendment of Part 90, 60 RR 2d 867, 868 ¶ 2 (1986).

licensed to Sobel in the Business Radio Service, two on the 800 MHz band and 13 on the 450 MHz and 470-512 MHz bands, should not be revoked. The Commission also designated for hearing Sobel's pending applications for 13 facilities, five on the 800 MHz and eight on the 450 MHz and 470-512 MHz bands and five pending requests by Sobel for finder's preferences for stations on the 800 MHz band. Following designation, the ALJ added an issue to determine whether Sobel made misrepresentations or lacked candor in a January 24, 1995 affidavit filed in support of Kay's motion to enlarge, change, or delete issues. Marc Sobel, FCC 97M-82 (May 8, 1997).

5. In his initial decision, the ALJ concluded that Sobel was unqualified to be a Commission licensee. Marc Sobel, 12 FCC Rcd 22879 (ALJ 1997). He found that, consistent with the criteria set forth in Intermountain Microwave, 24 RR 983 (1963), Sobel transferred control of the stations covered by the Management Agreement to Kay without Commission authorization. Id. at 22899-900 ¶¶ 65-68. He further found that Sobel's affidavit misrepresented Kay's relationship to the Management Agreement stations and that Sobel also lacked candor before the Commission both by failing to submit voluntarily the Management Agreement to the Commission and in correspondence with the Commission. Id. at 22900-902 ¶¶ 69-77. The ALJ therefore revoked Sobel's licenses, denied his applications, and dismissed his finder's preference requests. Id. at 22902-03 ¶¶ 78-80.

6. Now before the Commission are exceptions filed by Sobel and Kay and a reply by the Bureau and several associated pleadings. For the reasons set forth below, we modify the initial decision. We find that Sobel did transfer control of the Management Agreement stations without Commission authorization and lacked candor about the status of the stations. However, we conclude that it is appropriate to limit the sanctions for these improprieties to Sobel's interests on the 800 MHz band.

III. PROCEDURAL MATTERS

7. Before we turn to the merits of the case before us, we wish to address three procedural matters. First, Sobel argues in his exceptions that the hearing in this proceeding violates 5 U.S.C. § 558(c), which states in pertinent part:

> Except in cases of willfulness or those in which the public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given --
>
> (1) notice by the agency in writing of the facts or conduct which may warrant the action; and
>
> (2) opportunity to demonstrate or achieve compliance with all lawful requirement[s].

Sobel claims that the hearing designation order was the first notice he had of the transfer of control allegations and that, prior to designation, the Bureau had declined Sobel's requests to apprise him of the Bureau's concerns. Sobel disputes that the "willfulness" exception applies in this case. The Bureau asserts that Sobel's alleged misconduct was

"willful" within the meaning of the Communications Act.

8. We find that the hearing designation order in this proceeding complies with 5 U.S.C. § 558(c) because the misconduct alleged was "willful." The term "willful" is not defined by the APA. Thus, to determine the appropriate definition of "willful" for purposes of applying § 558(c), we refer to the substantative statute involved, in this case the Communications Act. See Hutto Stockyard, Inc. v. U.S. Department of Agriculture, 903 F.2d 299, 304 (4th Cir. 1990) (Packers and Stockyards Act); Lawrence v. Commodity Futures Trading Commission, 759 F.2d 767, 773 (9th Cir. 1985) (Commodities Exchange Act); Finer Foods Sales, Inc. v. Block, 708 F.2d 774, 778 (D.C. Cir. 1983) (Perishable Agricultural Commodities Act). The Communications Act states:

> The term "willful", when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act, or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States.

47 U.S.C. § 312(f)(1). Both of the issues designated in this proceeding clearly involve conscious and deliberate acts and, therefore, "willfulness."

9. Second, on February 27, 1998, Sobel filed a pleading entitled Request for Inquiry and Investigation in which he alleges that the Bureau committed improprieties in connection with this proceeding. In his reply to the Bureau's opposition, Sobel indicates that:

> The Bureau argues that Sobel's *Revised Request for Inquiry and Investigation ("Request")* is an improper an untimely supplement to Sobel's appeal from the *Initial Decision of Administrative Law Judge John M. Frysiak* . . . .But Sobel is not seeking to supplement his appeal. Sobel timely submitted his *Consolidated Brief and Exceptions ("Exceptions")* and he stands by that pleading insofar as the Commission's review of the *Initial Decision* is concerned. For purposes of the *Request*, Sobel is not challenging the presiding officer's conduct of the hearing and his *Initial Decision*, nor is he challenging the action of the Commission in designating the hearing. Sobel is separately seeking an inquiry and investigation by Bureau personnel in connection with the proceeding.

Reply to Opposition at 1-2. The cited language makes clear that Sobel's request has no bearing on our review of the initial decision, and we need not consider it further here. Nevertheless, out of an abundance of caution, we have examined Sobel's allegations. In many respects, these allegations are identical to those independently raised by Kay in WT Docket No. 94-147. See James A. Kay, Jr., 13 FCC Rcd 16369 (1998), pet. for recon. dismissed, 14 FCC Rcd 1291 (1998). In considering Kay's allegations, we found no basis

to conclude that the Bureau's conduct had resulted in any material prejudice and we see no reason to believe that this conduct prejudiced Sobel. Id. We reaffirmed this conclusion, disavowing adverse conclusions by Chief Judge Chachkin, after examining the full record in the Kay proceeding. James A. Kay, Jr., FCC 01-341 (adopted Nov. 20, 2001) at n.3 (see paragraph 10, infra). Additionally, Sobel contends that the Bureau acted unreasonably after the inclusion of Sobel's licenses in the Kay hearing designation order had been questioned. Sobel alleges that the Bureau declined to permit Sobel to address the Bureau's concerns outside the context of a hearing proceeding and instead initiated the designation of this proceeding. As the discussion below indicates, our review of the record developed in this proceeding demonstrates that there was an ample basis to designate this proceeding for hearing and fails to disclose any indication that Sobel was denied a full opportunity to meet the issues raised. Accordingly, no further action is warranted.

10. Third, Sobel asks the Commission to defer review of the initial decision in this proceeding and consolidate consideration of the initial decision in this proceeding with that in WT Docket No. 94-147 concerning James A. Kay, Jr. In that proceeding, then Chief Administrative Law Judge Joseph Chachkin ruled that Kay, and Sobel, did not make misrepresentations or lack candor before the Commission. James A. Kay, Jr., FCC 99D-04 (ALJ Sept. 10, 1999). His findings were thus contrary to Judge Frysiak's findings in this proceeding. We have on our own motion undertaken to consider the two proceedings concurrently. In a companion decision we have ruled today on exceptions filed by the Wireless Telecommunications Bureau in WT Docket No. 94-147. James A. Kay, Jr., FCC 01-341 (adopted Nov. 20, 2001) (Decision). In that proceeding, we held that because Kay is a party in WT Docket No. 97-56 (this proceeding), he is bound by the determinations made here to the extent that they involve findings and conclusions common to the two proceedings. Decision at ¶ 85. As Sobel requests, we considered the fact that Chief Judge Chachkin and Judge Frysiak reached inconsistent conclusions about the credibility of Kay and Sobel. We decided not to defer to either ALJ and based our decision on our own independent assessment of the nature of the representations made and the circumstances that were involved. Decision at ¶¶ 86-87. In view of our action, we will dismiss Sobel's petition to defer and consolidate as moot.

IV. TRANSFER OF CONTROL

11. Background. The ALJ found that Sobel and Kay have been friends for over 20 years and that they have each been involved in the land mobile radio business since the 1970s. 12 FCC Rcd at 2282-83 ¶¶ 7-9. In the 1990s, Sobel became interested in holding 800 MHz licenses. He did not, however, have the disposable funds to invest in 800 MHz and thus did not have the option of pursuing 800 MHz operations on his own. He approached Kay, who already owned profitable 800 MHz stations. Sobel relied on Kay to prepare the applications, because Kay had the necessary specialized software and knowledge. Sobel and Kay also entered into an oral agreement under which Kay would manage the stations. Id. at 2283-84 ¶¶ 11-14. In September or October, 1994, Kay received, in response to a Freedom of Information Act request, a copy of a draft hearing designation order relating to his stations (which, as noted above, also dealt with stations licensed to Sobel). Shortly, thereafter, on October 28, 1994, Sobel and Kay reduced their

oral agreement to writing. (The written agreement was corrected and supplemented on December 30, 1994.) The agreement was prepared by Brown & Schwaninger, a law firm then representing both Sobel and Kay. It is effective for a term of 10 years and renews automatically for five consecutive 10 year terms unless Kay gives notice to the contrary. Id. at 2284-85 ¶¶ 15-16, 18.

12. The ALJ analyzed the terms of the Management Agreement in light of the criteria set forth in Intermountain for determining the control of nonbroadcast radio facilities. These criteria are:

> (a) Does the licensee have unfettered use of all facilities and equipment?
> (b) Who controls daily operations?
> (c) Who determines and carries out policy decisions, including preparing and filing applications with the Commission?
> (d) Who is in charge of employment, supervision and dismissal of personnel?
> (e) Who is in charge of the payment of financing obligations, including expenses arising out of operating?
> (f) Who receives monies and profits from the operation of the facilities?

12 FCC Rcd at 22899 ¶ 66. See Intermountain, 24 RR at 984. Additionally, Intermountain indicates that:

> Ownership of the licensed facilities by someone other than the licensee is not necessarily inconsistent with these incidents of control. At a minimum, however, where ownership rests in hands other than those of the licensee, the maintenance and retention of the latter's exclusive right to operate must be clearly reflected.

24 RR at 984-85. To clarify our discussion, we will first present the ALJ's findings, the parties' responses to those findings, and our analysis for each of the individual Intermountain criteria. We will then discuss our overall analysis of the transfer of control issue.

(a) Does the licensee have unfettered use of all facilities and equipment?

13. The ALJ found that under the terms of the Management Agreement Kay "shall be the sole and exclusive supplier of all equipment and labor required to maintain and repair the Stations' facilities . . ." 12 FCC Rcd at 22885 ¶ 19. Sobel, in turn, maintains and repairs the stations as a contract technician for Kay, to whom Kay pays an hourly fee. Id. at 2285, 22887-88 ¶¶ 20, 27. The ALJ found that Sobel performed this role in accordance with an unwritten understanding between Sobel and Kay that was not part of the Management Agreement. Id. at 2285 ¶ 20. Sobel also repairs and services approximately 350 stations that Kay currently owns or manages. Id. at 22882-83 ¶ 9. To

perform these functions, Sobel must drive through locked security gates and gain access to locked buildings and cabinets. Id. at 22885-86 ¶ 21. Sobel has in his possession the keys necessary to accomplish this. Moreover, control points for the stations are located in Sobel's home office. Id. Sobel also possesses the access codes needed to activate the repeaters and performs a majority of the activations on both the Management Agreement stations and Kay's stations. Id. at 2287 ¶ 25.

14. Sobel and Kay submit that Sobel's access to the stations' facilities, including the possession of keys needed to access locked facilities, demonstrates that he has "unfettered use" within the meaning of Intermountain.

15. The Bureau responds that Sobel's access to the facilities is meaningless in light of the fact that, under the Management Agreement, Kay is the sole supplier of equipment and labor for the stations. The Bureau stresses that Sobel's access to the facilities is as Kay's contractor and that Kay has the authority to replace Sobel in that capacity, if he wants to.

16. We agree with Sobel and Kay that Sobel has "unfettered use" of the stations' facilities. The key question under this criterion is one of access. See Brian L. O' Neill, 6 FCC Rcd 2572, 2575 ¶ 28 (1991). The Management Agreement provides that:

> [Sobel] shall have unlimited access to all transmitting facilities of the Stations, shall be able to enter the transmitting facilities and discontinue any and all transmissions which are not in compliance with the FCC rules . . . .

SBL Exh. 3 [WTB Exh. 39] at 5 ¶ VIII. Moreover, the record makes clear that Sobel in fact has access to the stations' facilities, has possession of keys necessary to enter locked facilities, and has a control point for the stations in his home. Tr. 118, 189-90, 225-26. In this regard, we do not find it significant that, as the Bureau points out, Sobel exercises this access primarily in his capacity as a contract technician for Kay and that he has similar access to Kay's stations. Tr. 118. The fact remains that he has access. However, this factor ultimately has little significance in this case, because it is significantly outweighed by other factors demonstrating an unauthorized transfer of control.

(b) Who controls daily operations?

17. According to the ALJ, the Management Agreement provides that Kay "shall be the sole and exclusive agent for the sale of all services" provided by the Management Agreement stations and for "the management of the Station's transmitting facilities and associated business." Pursuant to this provision, Kay and his staff handle bookkeeping, billing, and collections and the payment of station obligations. Kay also has the exclusive right to negotiate and execute contracts with customers of the stations. 12 FCC Rcd at 22886 ¶ 22. Kay's salespeople sell time on the Management Agreement stations, Kay's stations, and community repeaters. Sobel recruits customers himself for his 450 MHz and 470-512 MHz band stations, and will sometimes refer customers to Kay. Id. at 22886-87 ¶¶ 23-24. (The ALJ found that Kay, Sobel, and other dealers customarily refer customers

to each other. Id.) The ALJ found that customers are placed on Kay's stations, the Management Agreement stations, or both based on the customer's needs and not on the ownership the stations. Id. Salesman have no reason to know whether they are selling time on a Management Agreement station or a Kay station. Id. at 22888 ¶ 28. When a Kay salesperson has made a sale, the salesperson goes to Barbara Ashauer, a Kay employee for the assignment of frequencies and codes. Ashauer may either assign the frequencies and codes herself or ask the assistance of Kay or Sobel. Sobel also assigns frequencies for many Kay stations. Ashauer then generates a request to activate the customer's radio system, which is usually performed by Sobel for both the Management Agreement and Kay stations. Id. at 22886-87 ¶¶ 24-25. As to billing, customers receive a consolidated bill covering both Management Agreement and Kay stations, unless they request separate bills. Sobel reviews revenue levels for Management Agreement stations every few months. He has free access to Kay's office during business hours and obtains the information from Kay's computer. Id. at 22887 ¶ 26.

18. Additionally, Sobel performs repair and maintenance services for the Management Agreement and Kay's stations. He monitors both types of stations and receives calls from Kay's employees. Sobel's invoices do not distinguish between the two types of stations. 12 FCC Rcd at 22887-88 ¶ 27. Kay's technicians also work on stations Kay owns or manages, including the Management Agreement stations. They have no reason to know whether the station they are working on is licensed to Kay. Id. at 22888 ¶ 28.

19. In their exceptions, Sobel and Kay characterize Sobel as a "hands on owner" who constructed and maintains facilities, monitors the repeaters, and visits them. They observe that Sobel participates in setting billing rates (see paragraph 25, infra) and in placing customers on repeaters and that he has full access to station records. Additionally, they note that the Management Agreement contains a provision that expressly reserves ultimate control over the management of the stations to Sobel.

20. The Bureau emphasizes that the Management Agreement gives Kay the exclusive right to manage the stations' facilities and business. The Bureau asserts that most of Sobel's participation in station affairs is as Kay's contractor and that neither Sobel nor Kay's employees treat the Management Agreement stations any differently from stations owned by Kay. The Bureau discounts the significance of the provision in the Management Agreement reserving ultimate control to Sobel. It maintains for example that Sobel can reject contracts and disapprove transmitter site locations only if doing so would be in Kay's interests as well as Sobel's.

21. The record indicates that Kay routinely exercises control over daily operations. The terms of the Management Agreement makes this clear: These terms provide that:

> [Kay's] duties shall include all administrative and office functions associated with the Stations' services, including but not limited to bookkeeping, billing and collections.

SBL Exh. 3 [WTB Exh. 39] at 2 ¶ I.

> [Kay's] duties shall include all management functions associated with the operation of the Stations, including but not limited to invoicing of users, collection of payments from users, bookkeeping and accounting processes, disbursement of payments to suppliers of goods and services, and control point operation. . . . the negotiation and execution of any [contracts with third parties] shall be within the sole and exclusive discretion of [Kay].

SBL Exh. 3 [WTB Exh. 39] at 2 ¶ II.

> [Kay] shall be the sole and exclusive supplier of all equipment and labor required to maintain the Stations' facilities. . . .

SBL Exh. 3 [WTB Exh. 39] at 3 ¶ III.

22. There is no reason to depart from the ALJ's ample findings concerning the dominant role of Kay and his employees in the stations' daily operations pursuant to these provisions. We find the attempts by Sobel and Kay to characterize Sobel as a "hands on" owner unpersuasive, especially since Sobel admits that he exercises most of his functions as a contract technician for Kay and that his duties are virtually identical to those exercised with respect to Kay's stations. Tr. 107-08, 114, 116-18, 123-24, 144, 314-16. Moreover, the record indicates that there is generally no distinction made between the management of the Management Agreement stations and that of Kay's stations. Thus, Kay's sales people and technicians generally do not make a distinction between the two classes of stations, there is no distinction made in assigning customers to one class or the other, and the customers generally receive a single bill regardless of which class of station they use. Tr. 314-17, 343-49. The significance of Kay's operational control here must be evaluated in light of the record as a whole and will be further discussed below.

(c) Who determines and carries out policy decisions, including preparing and filing of applications with the Commission?

23. The ALJ made findings concerning five policy-related matters: (1) preparation and filing of applications, (2) setting billing rates, (3) clearing channels, (4) buying and selling stations, and (5) retention of counsel.

24. Applications. The ALJ found that Kay would do the research needed to locate available frequencies, which he would review with Sobel, making a recommendation where the repeater would be located. 12 FCC Rcd at 22888 ¶ 30. Of the six or seven sites at which the stations are located, one is a site used for Sobel's 450 MHz and 470-512 MHz band stations (and subleased to Kay) and the others are sites for which Kay negotiated and executed leases. Id. at 22888 ¶ 31. Sobel testified that Kay prepared "most" of the applications using specialized software that he had on his computer. Sobel indicated that he could have prepared the applications himself, but that because Kay had the software and specialized knowledge, it was more convenient for Kay

to do so. Id. at 22888-89 ¶ 32. Sobel reviewed and signed each application but made no edits except for correcting the misspelling of his name. Id. at ¶ 22889 35. Kay also filled out submissions to the frequency coordinator that reviewed the applications, which Sobel signed. Id. at 22889 ¶ 34. Kay, at Sobel's request, also prepared responses to Commission application return notices. Id. at 22889 ¶ 36.

25. Billing rates. The ALJ found that the standard rate for the Management Agreement stations was $12 a month, the same as for Kay's stations. The last change in standard rates occurred three or four years ago, and Sobel does not recall whose idea it was to make the change. According to Sobel, Kay or his employees do the majority of negotiating with customers but Sobel does some negotiating. 12 FCC Rcd at 22891 ¶ 42.

26. Clearing channels. All of the applications for the Management Agreement stations were for encumbered channels -- i.e., channels shared with other licensees. The ALJ found that Kay and Sobel agreed that Kay would do the work and spend the money needed to clear the channels -- i.e., to have unused licenses on the channels cancelled and to persuade other licensees to vacate the channels. Sobel claimed that he did not have the time or money to do this and stated that he knew that Kay was successful at this activity. Sobel had assisted Kay in doing work needed to clear Kay's channels. 12 FCC Rcd at 22890 ¶ 37-38.

27. Buying and selling. The ALJ made several findings concerning the buying and selling of stations. Three of the Management Agreement stations were obtained through assignment. Sobel paid nothing for the stations and does not know whether money was paid. 12 FCC Rcd at 22890 ¶ 39. Under the Management Agreement, Kay has an option to purchase any of the Management Agreement stations for $500 each for the license, assets, and business associated with the station. The Management Agreement also prohibits Sobel from selling any of the Management Agreement stations without Kay's approval. Id. at 22890 ¶ 40. Three of the stations subject to the Management Agreement have been sold. Kay arranged for the sale of one station to William Matson for between $70,000 and $100,000, of which Sobel received $20,500. Sobel received $500 of the proceeds from the sale of a second station. Sobel received the cancellation of a license on another frequency in return for the assignment of a third station, which increased the value of Sobel's station. Sobel persuaded Kay not to accept a $1.5 million offer for the Management Agreement stations. Id. at 2289091 ¶ 41.

28. Counsel. The ALJ found that Kay introduced Sobel to the law firm of Brown & Schwaninger, which also represented Kay, in the mid-1990s. Brown & Schwaninger represented both Sobel and Kay in drafting the Management Agreement. Kay also directed Sobel to Robert Keller, Sobel's current FCC counsel. Kay has paid all of Sobel's legal fees in connection with the Management Agreement stations, including the costs of this hearing. 12 FCC Rcd at 22890 ¶ 43.

29. Kay claims that all actions regarding the stations, including the filing of applications, are made under Sobel's supervision and control. Sobel indicates that he makes policy decisions by: (1) determining when to make adjustments in prices charged customers; (2) reviewing the placement of customers on repeaters; (3) reviewing

applications and filings (which Kay prepares as a convenience); and (4) having the stations' main control point in his office. Sobel contends that Kay's participation is at his request and under his supervision.

30. The Bureau replies that an examination of the five types of policy decisions discussed by the ALJ shows that Kay makes policy decisions.

31. The record fails to substantiate that Sobel retained his authority to make policy decisions with respect to the Management Agreement stations. Rather, the record consistently demonstrates Sobel's delegation of authority to Kay in each of the five areas reflected in the record. (1) Kay had "primary responsibility" for preparing applications and suggested frequencies and transmitter sites. Tr. 73-75, 206. While Sobel reviewed all forms, he recalled making no edits except for correcting the misspelling of his name. Tr. 75. (2) The record discloses little if any input by Sobel in setting the stations' billing rates. The standard rate charged by the Management Agreement stations is the same as for Kay's stations and is assertedly typical of the industry as a whole. Tr. 129. Sobel could not recall whose idea it was to change the standard rate, some three or four years ago. Tr. 130. Although Sobel claims to have determined the rates charged some individual customers, he could recall changing the rate charged by Kay or his employees only two or three times and admits that he discussed rates with Kay only a handful of times a year. Tr. 123, 129. Moreover, this claim is contrary to the express terms of the Management Agreement, which gives Kay the sole discretion to negotiate contracts. SBL Exh. 3 [WTB Exh. 39] at 2 ¶ IIA. (3) Sobel admits that he did not have the time or money to deal with the clearance of the channels on which the Management Agreement stations operated and that he relied on Kay's resources and success in this area. Tr. 198-99. (4) Kay arranged for the acquisition of some Management Agreement stations through assignment, and Sobel was unaware of the details. Tr. 101-02. Kay also arranged for the sale of a station to Matson. Tr. 366. Sobel did not know the amount of money received for a second station that was sold. Tr. 127-28. In describing the decision not to sell the Management Agreement stations for $1.5 million, Sobel indicates that he "convinced" Kay not to sell and that Kay "acquiesced" in Sobel's view -- not that Sobel decided not to sell. Tr. 275. (5) Sobel has consistently used lawyers referred by Kay and these lawyers sometimes represented Kay at the same time. Tr. 109-10. We find no justification for treating Sobel's involvement in the placement of customers on repeaters and the presence of a control point in his home, which he can use to activate and deactivate radios, as evidence of decisonmaking authority since they are consistent with his duties as a contract technician for Kay. Tr. 123-24, 314-17, 343-49.

32. While Sobel might legitimately have delegated authority to Kay in any of the individual instances mentioned, the record as whole, at best, shows a failure by Sobel to exercise positive authority over policy decisions. At worst, the record suggests a wholesale deferral to Kay. It thus, fails to lend substance to the provision in the Management Agreement that: "[Sobel]" shall retain ultimate supervision and control of the operation of the stations." SBL Exh. 3 [WTB Exh. 39] at 5 ¶ VIII. The ultimate significance of this factor will be discussed below.

(d) Who is in charge of employment, supervision and dismissal of personnel?

33. The ALJ found that Sobel has no employees and is not sure whether he ever hired any contractor to do work relating to a Management Agreement station. 12 FCC Rcd at 22892 ¶ 44. The employees of Kay who perform work relating to the Management Agreement stations are hired, fired, and supervised by Kay.

35. Kay and Sobel assert that Kay's employees perform functions that are limited by the Management Agreement.

35. The Bureau points out that Kay's employees perform all duties associated with the stations' business and that Kay could dismiss Sobel as his contractor.

36. On the facts of this case, this criterion is essentially redundant with the question of who controls daily operations. All of the employees and contractors (including Sobel) are retained by Kay in connection with his responsibilities under the Management Agreement. Accordingly, we will not analyze this factor separately.

(e) Who is in charge of the payment of financing obligations, including expenses arising out of operating?

37. The ALJ found that, under the Management Agreement, Kay is responsible for paying all of the stations' construction and operating expenses. Kay estimated that his total investment in station equipment is $97,500. He did not know how much he has paid in operating expenses for the Management Agreement stations because he does not break out the expenses based on the ownership of the stations 12 FCC Rcd at 22892 ¶ 46-47.

38. Sobel and Kay argue that the provisions of the Management Agreement under which Kay pays station expenses and purchases equipment represent a legitimate business judgment on Sobel's part. They urge that it would have been more expensive for Sobel to construct and operate the stations on his own and that it was therefore reasonable for him to finance the operation out of future revenues rather than up front. The Bureau finds Sobel's and Kay's reference to business judgment unpersuasive.

39. The Management Agreement is structured to relieve Sobel of any liability for the construction and operation of the stations. Specifically, the Management Agreement provides that Sobel has no liability in relation to contracts regarding the provision of marketing services (SBL Exh. 3 [WTB Exh. 39] at 2 ¶ IA), management services (Id. at 2 ¶ IIA), and maintenance services (Id. at 3 ¶ IIIA), and that Kay shall bear all costs of construction and operation. (Id. at 3 ¶ IV, 6 ¶ XIII). Accordingly, Kay pays all of the stations' expenses and has invested some $97,500 ($6,500 x 15) to build the stations. Tr. 131, 144, 353-54. Sobel acknowledges that his arrangements with Kay were intended to relieve him of the burden of independently acquiring the transmitter sites and equipment and of having the facilities installed and maintained. Tr. 185-86. Indeed, he testified that he regarded his arrangement with Kay as "a good deal" in part because it posed "very little" financial risk. Tr. 309.

40. We have no reason to dispute the characterization of Sobel and Kay that this reflects a reasonable exercise of business judgment on Sobel's part. However, such an exercise of business judgment appears tantamount to an intent to transfer the risks

normally associated with ownership and control. Thus, for example, a business owner who decides to sell an equity interest in a venture as an alternative to seeking bank financing has encumbered his ownership interest. As Sobel and Kay aptly put it, such an action would serve to finance the start-up of the business out of future revenues. We will further consider the implications of this factor below.

(f) Who receives monies and profits from the operation of the facilities?

41. According to the ALJ, the revenues from the Management Agreement stations are deposited in Kay's bank account along with the revenues from Kay's stations. Under the Management Agreement, Kay is entitled to the first $600 a month in revenue from each station plus 50 percent of the revenue in excess of $600. At the time of the hearing, four of the 15 Management Agreement stations had revenues of over $600 a month and the total revenue of the 15 stations was between $6,000 and $7,000 a month. Nevertheless, Sobel has not received any money from the stations other than his hourly fees as a contractor, since he and Kay interpret the Management Agreement as entitling Kay to retain all revenues until the total revenue of all of the stations exceeds $9,000 a month (i.e., $600 x 15). 12 FCC Rcd at 22892-93 ¶ 48.

42. Kay and Sobel defend the legitimacy of the arrangement under which Kay receives a share of station revenues. Kay argues that he validly receives the first $600 a month of station revenues as compensation for his services. Sobel maintains that he would have received more than his hourly compensation as a contractor if the impediments posed by the Commission proceedings involving the stations had not impaired their revenues. Additionally, Sobel maintains that there is nothing improper in Kay using his own bank account when collecting station revenues.

43. The Bureau responds that it is suspicious that Sobel has not yet received any of the stations' revenues.

44. The record indicates that, pursuant to the Management Agreement, Kay would receive a large percentage of the stations' revenues. If, as Sobel estimated at one point (Tr. 268), the stations could be expected to generate $1,000 a month, Kay would receive 80 percent of the revenues ($600 + 50% x $400). At the time of the hearing, Kay had retained 100 percent of the stations' revenues of approximately $400 to $470 per station a month ($6,000 or $7,000 / 15). Tr. 132.

45. We accept the claims of Sobel and Kay that the retention of funds by Kay reflects compensation for Kay's management services, reimbursement for expenses paid by Kay, and the rental of station equipment owned by Kay. Tr. 103-04, 144, 186. See also SBL Exh. 3 [WTB Exh. 39] at 4 ¶ VI. However, these considerations appear to apply primarily to Kay's right to the first $600 a month earned by each station. Tr. 144, 186. Otherwise, it appears that the parties intend to share the proceeds of the stations more or less equally, in the manner of partners. We will discuss the ultimate significance of this factor below.

Ownership of facilities

46. The ALJ found that pursuant to the terms of the Management Agreement Kay selected, purchased, and provided all equipment used in connection with the stations. 12 FCC Rcd at 22885 ¶ 19. The ALJ found that the equipment is "leased" (ALJ's quotes) to Sobel and that Sobel has no title, interest, or control over the equipment except to the extent he was granted permission to use Kay's equipment. Id. He also found that the Management Agreement gives Kay an exclusive option to purchase the stations for $500 each. Id. at 22890 ¶ 40. It also requires Sobel to maintain ownership of the stations. The ALJ therefore concluded that Sobel was precluded from selling any of the stations, but that Kay could sell the stations by first exercising his purchase option. Id.

47. Sobel contends that the ALJ had no basis to question the bona fides of the arrangement under which Sobel leased the stations' equipment from Kay. He further contends that a lease is a legitimate means by which a licensee may possess equipment consistent with the licensee's retention of control. Both Kay and Sobel argue that the purchase option provisions are consistent with the retention of control by Sobel.

48. The Bureau points out that Kay and not Sobel paid the expenses of constructing the stations and that Sobel does not pay rent under the supposed lease, since under the Management Agreement, rental payments are included in Kay's share of the station revenues. The Bureau also maintains that the purchase option indicates a transfer of control to Kay, since Kay has the power pursuant to the option to oust Sobel by purchasing the stations at a price far less than their market value.

49. Kay's ownership of the stations' equipment and his capital investment in this equipment represent a significant factor in this case. In this regard, we discount Sobel's testimony that because the equipment is leased to Sobel, Kay should not be regarded as having an interest in it. Tr. 147. As the Bureau correctly points out, despite the lease, Kay continues to possess the equipment as part of his day-to-day management of the stations, in relation to which Sobel is a contract technician. Moreover, as the Bureau also points out, the Management Agreement provides no particular sum as the rental payment; the rent is simply an unspecified portion of the total compensation received by Kay. SBL Exh. 3 [WTB Exh. 39] at 3 ¶ IV.

50. Additionally, in this case, the purchase option gives Kay a further proprietary interest in the stations. The option permits Kay, for a period of ten years, to purchase any Management Agreement station for $500 per station. SBL Exh. 3 [WTB Exh. 39] at 4 ¶ VII. The record indicates that $500 is considerably less than the fair market value of the stations. As noted, one of the stations has already been sold for between $70,000 and $100,000. Tr. 126. Similarly, Sobel also prevailed upon Kay not to accept an offer of $1.5 million for all of the stations -- i.e., $100,000 per station. Tr. 275. Kay testified that the purpose of the option was specifically to prevent Sobel from being able to sell the stations in derogation of Kay's long-term contracts. Tr. 365-66. Indeed, the purchase option specifically provides that Sobel may not sell the stations or use them as security. SBL Exh. 3 [WTB Exh. 39] at 5 ¶ VIIE. Moreover, as the ALJ found, the option effectively gives Kay the power to "freeze out" Sobel if he chooses to do so. Sobel by contrast has no right to terminate his relationship with Kay. He has no right to sell the stations, and the Management Agreement has a term of 10 years and renews automatically at Kay's sole discretion for up to 50 years. SBL Exh. 3 [WTB Exh. 39] at 6 ¶ XIV. These provisions give Kay significant leverage over Sobel.

Summary

51. Based on the foregoing, the ALJ found that Kay had the ultimate control of the Management Agreement stations in accordance with the Intermountain criteria. He cited the following specific factors: (1) Kay prepared applications and Commission correspondence; (2) Kay selected and purchased all equipment; (3) Kay supplies the labor to maintain and repair the facilities; (4) Kay controls the hiring and firing of operating personnel; (5) Kay carries out all administrative duties associated with marketing the stations, such as bookkeeping, billing, and collections; (6) Kay pays all expenses; (7) Kay negotiates and executes contracts with customers; (8) Kay did the work and provided the money to clear the channels used by the stations; (9) Sobel was unfamiliar with the details of the assignments of the three stations that were sold; (10) Kay has an option to purchase the stations for $500 each; and (11) the revenues of the stations are deposited in Kay's bank account.

52. Sobel and Kay argue that their relationship constitutes a resale arrangement such as the Commission encourages. Sobel contends that a similar business arrangement involving an SMR licensee was approved in Motorola, Inc. File Nos. 50705 et al. (PRB 1985) (unpublished). Sobel and Kay urge that the Intermountain criteria are flexible and should take into account the character of the particular service involved. Kay asserts that Sobel has retained control of the stations because he controls daily operations, makes policy decisions, and has unfettered access to facilities and records.

53. As Sobel suggests, guidelines set forth in Motorola and restated in Public Notice, 64 RR 2d 840 (PRB 1988), have been used to evaluate whether management agreements involving SMR licensees constituted an improper transfer of control. See Implementation of Sections 3(n) and 332 of the Communications Act, 9 FCC Rcd 7123 7127-28 ¶ 20 (1994). These guidelines provide that licensees may hire entities to manage their SMR systems but they may not contract away control of their systems. Public Notice, 64 RR 2d at 841.[3] At a minimum, licensees must retain bona fide proprietary interests in, and exercise supervisory control over their systems. Id.

54. Motorola involved a management agreement between Motorola, Inc. (Motorola) and an SMR licensee called Comven that was similar in many respect to that involved here. Under the agreement, Comven provided the necessary radio equipment for the system. As does Kay in this case (see paragraph 21, supra), Motorola controlled the daily operations of the stations. Specifically:

> The services provided by Motorola under the contract are

[3] Sobel argues that his relationship with Kay is a valid resale arrangment. " . . . [R]esale is an activity in which one entity (the reseller) subscribes to the communications services or facilities of a facilities-based provider and then reoffers communications services to the public (with or without 'adding value') for profit.[footnote omitted]" Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, 11 FCC Rcd 18455, 18457 ¶ 3 (1996). Since the Sobel-Kay agreement specifically provides for Kay's management of the licensed facilities, we decline to treat it as simply a resale agreement.

> installation, including antennas and cables; testing of equipment; payment of antenna site charges; maintenance; marketing;, promotion and sales; customer billing and collections; and updates to systems software. Any costs or additional equipment and supplies associated with these services or the operation of the SMR system are to be paid or provided by Motorola. As compensation for these services Motorola receives 70 percent of the monthly gross collections received from end-user customers of the systems.[footnote omitted.] The contracts are effective for ten years and are renewable at Motorola's sole option for an additional five years.

Motorola at ¶ 8. In determining that the agreement did not represent an unauthorized transfer of control, the Bureau relied primarily on the fact that Comven had purchased the stations' equipment and financed it independently of Motorola. Motorola at ¶ 19; Public Notice, 64 RR 2d at 841. This factor was deemed to give the licensee a proprietary interest in the stations' equipment which would not be taken over by the third party hired to manage the stations and would give the licensee the ability to exercise the degree of control over its systems which was consistent with its status as a licensee. Motorola at ¶17. The Bureau also found that the agreement required Motorola to perform its functions pursuant to the supervision and instruction of Comven and that if Motorola failed to comply with this provision Comven could terminate the agreement. Motorola, ¶¶ 19-20; Public Notice, 64 RR 2d at 841.

55. More recently Implementation of Sections 3(n) and 332 of the Communications Act, supra, recognized that different criteria had been applied to transfer of control questions involving private and common carriers and prospectively adopted the Intermountain test for both such services.

56. In this case, we find that whether judged by the Motorola test or with reference to the Intermountain criteria, Sobel has not retained control of the licensed facilities. Central to the analysis is that Sobel does not have the requisite proprietary interest in the licensed facilities. Unlike Comven, Sobel did not purchase the stations' equipment or finance it independently of Kay. Rather, Kay owns the stations' equipment and has made the corresponding capital investment. For the reasons set forth in paragraph 49, supra, we find, as did the ALJ, that the terms of the lease give Sobel essentially no proprietary interest in the equipment. Moreover, as described in 50, supra, the purchase option gives Kay a further proprietary interest in the stations and considerable leverage over Sobel, who could be divested of the stations by Kay under its provisions. By contrast, Sobel can neither terminate the agreement nor sell the stations. Kay's payment of financial obligations (see paragraph 39, supra) and the division of revenues (see paragraphs 44-45, supra) are entirely consistent with Kay's proprietary interest.

57. Moreover, the record before us refutes the contention that Kay operates the licensed facilities under Sobel's "supervision and instruction." Our examination of the record relating to policy decisions indicates that Sobel consistently defers to Kay, which

indicates, at best, the absence of any positive exercise of authority in this area and, at worst, a wholesale surrender of such authority to Kay. See paragraph 31, supra.

58. Thus, in light of both Intermountain and Motorola, we find that Sobel has failed to retain the requisite degree of control consistent with his claimed status as a licensee. We therefore conclude that he has violated 47 U.S.C. § 310(d).

V. MISREPRESENTATION/ LACK OF CANDOR

59. As noted above (Paragraph 3, supra.), when the Commission designated Kay's licenses for hearing on December 13, 1994, it found that information available indicated that Kay may have conducted business under the name of Marc Sobel dba Airwave Communications. On January 25, 1995, Kay filed with the ALJ[4] a pleading entitled "Motion to Enlarge, Change, or Delete Issues," in which he asked among other things that any reference to Sobel's licenses should be deleted from the hearing designation order. 12 FCC Rcd at 22893 ¶ 49; WTB Exh. 44 at 4-5. The motion was supported by an affidavit by Sobel dated January 24, 1995. WTB Exh. 43. The ALJ found that Kay received drafts of the motion and affidavit from his attorneys, Brown & Schwaninger and that he called Sobel to tell him that there was an affidavit "that my attorneys wanted him to read. And, if correct, execute it." 12 FCC Rcd at 22893 ¶ 50. Kay and Sobel had a face-to-face meeting at which Kay asked Sobel to sign the affidavit. Sobel did so without making any changes or additions, although he was aware of his right to do so. Id.

60. The affidavit stated:

> I, Marc Sobel, am an individual, entirely separate and apart in existence and identity from James A. Kay, Jr. Mr. Kay does not do business in my name and I do not do business in his name. Mr. Kay has no interest in any radio station or license of which I am the licensee. I have no interest in any radio station or license of which Mr. Kay is the licensee. I am not an employer or employee of Mr. Kay, am not a partner with Mr. Kay in any enterprise, and am not a shareholder in any corporation in which Mr. Kay holds an interest. I am not related to Mr. Kay in any way by birth or marriage.

12 FCC Rcd at 22893-94 ¶ 51.

61. The ALJ found that the affidavit and pleading did not provide any description of the actual relationship between Sobel and Kay, although it was purportedly prepared in part because Sobel believed that the Commission was delaying the processing of his pending application because it was "confused" about the relationship between Sobel and Kay. 12 FCC Rcd at 22894-95 ¶¶ 52-53. The ALJ rejected as false the statement in the affidavit that Kay had no "interest" in stations or licenses assertedly held by Sobel. The

[4] Kay had earlier filed a version of the pleading with a supporting affidavit by Sobel with the Commission.

ALJ did not credit Sobel's attempts to reconcile this statement with the fact that Kay owned the stations' equipment, had an option to purchase the stations, and had a stake the stations' revenues, and held that this arrangement constituted "a fair amount of interest." Id. at 22895-96 ¶ 56-58, 22901 ¶ 73. The ALJ concluded that the affidavit was intended to "ward off" the Commission from being apprised of the true nature of the Kay-Sobel business relationship and that it therefore lacked candor. Id. at 22901 ¶ 73.

62. The ALJ also found other instances in which Sobel lacked candor before the Commission. The ALJ faulted Sobel for not voluntarily disclosing the Management Agreement to the Commission until requested to do so in a letter of inquiry. 12 FCC Rcd at 22897 ¶ 62, 22901-02 ¶ 74. The ALJ found that Sobel could "ill afford" to disclose the document, which was intended to fully describe the relationship between Sobel and Kay. Id.

63. The ALJ also took issue with a December 6, 1994 letter that Sobel sent to FCC staff member Gary Stanford at the Commission's Gettysburg, Pennsylvania facility regarding the Commission's failure to process Sobel's pending applications and requests. 12 FCC Rcd at 22897-98 ¶ 63, 22902 ¶ 75. The letter stated:

> I can only assume that I have been "blacklisted" by Mr. [Deputy Chief of the FCC's Gettysburg Office of Operations W. Riley] Hollingsworth and am having my applications held, my customers' applications held, and my finder's preference requests ignored due to my association with Mr. Kay. Contrary to whatever beliefs that may be held by Mr. Hollingsworth, which have resulted in his taking unwarranted actions against me, I would like to assure you that I am an Independent Two Way Radio Dealer. I am not an employee of Mr. Kay's or of any of Mr. Kay's companies. I am not related to Mr. Kay in any way. I have my own office and business telephone numbers. I advertise my own company name in the Yellow Pages. My business tax registration and resale tax permits go back to 1978 -- long before I began conducting any business whatsoever with Mr. Kay -- the apparent target of Mr. Hollingsworth.

WTB Exh. 46. The ALJ faulted Sobel for failing to explain his relationship with Kay and for asserting, without reservation, his independence from Kay.

64. Finally, the ALJ found lack of candor in responses to application return notices (which are sent to indicate problems with land mobile applications) prepared by Kay for Sobel. 12 FCC Rcd at 22898-99 ¶ 64, 22902 ¶ 76. The ALJ noted that on customer invoices attached to the responses, the name and address of Kay's business, Lucky's Two-Way Radios, had been blacked out before they were submitted to the Commission. The ALJ found that this was done to conceal the relationship between Sobel and Kay from the Commission.

65. The ALJ concluded that the above findings indicate that Sobel consistently

avoided disclosing the full nature of his relationship with Kay to the Commission and intended to deceive and mislead the Commission as to this relationship. The ALJ believed that this reflected serious misrepresentation and lack of candor. 12 FCC Rcd at 22902 ¶¶ 77-78.

66. In their exceptions, Sobel and Kay deny that the January 24, 1995 affidavit contained any misrepresentation or lack of candor. They claim that the affidavit was justified in stating that Kay had no "interest" in the stations, that Sobel was not Kay's "employee," and that Sobel did not do business "in Kay's name." Sobel and Kay contend that the affidavit reflected no intent on the part of Sobel to mislead the Commission. They assert that Sobel was merely trying to correct the Commission's misimpression that Sobel was an alter ego of Kay and that there was no need to explain the nature of their relationship any further. In any event, they submit that their attorneys, Brown & Schwaninger, drafted the affidavit and assured Sobel that it complied with Commission rules.

67. Sobel and Kay also deny that any other misrepresentations or lack of candor occurred. As to the Management Agreement, they contend that they would not have reduced the agreement to writing if they intended to conceal its terms from the Commission. They further contend that Sobel did not file the affidavit and thus had no reason to file the Management Agreement, which, in any event, he thought had been filed. They point out that Kay disclosed the agreement during discovery on March 24, 1995. Concerning the Stanford letter, Sobel argues, as he did with respect to the affidavit, that he was merely trying to disabuse the Commission of the idea that he was Kay's alter ego and had no reason to further elaborate upon the nature of his acknowledged "association" with Kay. Lastly, Sobel maintains that he did not delete Kay's business name from the application return responses and did not consider it important that Kay apparently had.

68. The Bureau supports the ALJ's findings of misrepresentation and lack of candor. According to the Bureau, Sobel knew that the Commission was confused about the relationship and that the Commission would want an accurate description of that relationship. The Bureau argues that the statements that Kay had no "interest" in the stations and that Sobel was not Kay's "employee" were false or at least misleading. The Bureau finds no evidence that Sobel actually relied on advice of counsel.

69. The Bureau considers it suspicious that the parties supposedly drafted the Management Agreement in response to Commission confusion about the Sobel-Kay relationship and then did not voluntarily disclose it. The Bureau considers the Stanford letter and the responses to the application return notices misleading.

70. We find that Sobel's January 24, 1995 affidavit was lacking in candor. Although Sobel testified that he intended merely to deny that he was an alter ego of Kay (Tr. 142-43), the affidavit makes several specific factual assertions about the relationship between Sobel and Kay. Most notably, the affidavit states that "Mr. Kay has no interest in any radio station or license of which I am the licensee." WTB Exh. 43. As our discussion under the transfer of control issue makes clear, we find that Kay had substantial interests in the Management Agreement stations. He owned the stations' equipment, he was entitled to a share of the stations' revenues, and held purchase options for the stations.

We find that Sobel's attempt at the hearing to justify the representation as referring only to "ownership of the license" (Tr. 147) is an unreasonably restrictive use of the word "interest." For example, we find wholly unpersuasive Sobel's self-serving explanation that because Kay leased the station's equipment to Sobel (see paragraph 49, supra), Kay did not have an interest in the equipment. Tr. 147.

71. Moreover, the record indicates that Sobel was aware of the questionable nature of the representation. Sobel admitted that:

> The word interest -- I thought about the word interest, because it was the only thing that in here might have been questionable, but it was in regards to the license and I didn't give it much thought, to be honest with you.

Tr. 156-57. Kay, in turn, acknowledged that Sobel had asked him about the meaning of the word "interest" in the affidavit and that Kay had told him that it referred to "ownership as in a partnership or ownership of stock, as having a direct financial stake in something. Being an owner or a stockholder or a direct party to something." Tr. 371 (Emphasis added.). Sobel acknowledges that he understands that Kay has a direct financial stake in the stations. Tr. 150.

72. Aside from the statement about "interest," the affidavit contains other statements that while perhaps technically correct tend to be misleading. The affidavit states: "I am not an . . . employee of Mr. Kay. . . . " WTB Exh. 43. As Sobel testified, that statement is accurate only because there is a technical distinction between an "employee" and an "independent contractor," in which capacity Sobel has long served Kay. Tr. 150-51, 247. The affidavit also states: I . . . am not a partner with Mr. Kay in any enterprise . . . ." WTB Exh. 43. That statement is also true only if a distinction is made between the technical legal definition of "partner" and the more colloquial usage. Thus, Sobel testified: "You can agree to split something without becoming a partnership." Tr. 151-52. The affidavit states: "I do not do business in [Mr. Kay's] name." WTB Exh. 43. As Sobel explained, that statement is true in the sense that Sobel does not conduct a business using Kay's name. Tr. 15-53. However, the Management Agreement stations, which are licensed to Sobel, are marketed by Kay under his own name as part of his business. Id.

73. All told, the affidavit leaves the impression that, as the motion it supported argues: ". . . Kay has no interest in any license or station in common with Marc Sobel. . . . " WTB Exh. 44 at 4. In the context of the Management Agreement stations, that impression is wholly misleading.[5] In this regard, we reject the suggestion that, because the hearing designation order erred in treating Sobel as an alter ego of Kay, it was permissible to be misleading about the true relationship between Sobel and Kay in challenging the designation order. As Sobel acknowledged, he understood that the Commission would

[5] In view of this finding, we do not believe that our analysis places excessive weight on our interpretation of any ambiguous word, as was found in Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344, 356 (D.C. Cir. 1998). Rather, we focus on the discrepancy between the reasonable interpretation that a reader would give to the affidavit and the facts as fully disclosed.

"eventually" want to know about the actual relationship between Sobel and Kay. Tr. 143, 156, 301. There is no justification for him to withhold this information even if he expected that the Commission would ultimately find it out. As the courts have stated:

> . . . the Commission must rely heavily on the completeness and accuracy of the submissions made to it, and its applicants in turn have an affirmative duty to inform the Commission of the facts it needs in order to fulfill its statutory mandate. This duty of candor is basic and well known.

RKO General, Inc. v. FCC, 670 F.2d 215, 232 (D.C. Cir. 1981).

> As a licensing authority, the Commission is not expected to "play procedural games with those who come before it in order to ascertain the truth" . . . . and license applicants may not indulge in common-law pleading strategies of their own devise.

Id. at 229.

74. We reject the argument that the affidavit does not disclose deceptive intent. The record indicates that the parties drafted the Management Agreement because they learned of the forthcoming hearing designation order and realized the need to put the details of their relationship in writing. Tr. 261-63, 299-301. In view of this circumstance, the failure of the affidavit to be forthcoming about this relationship and the misleading character of the affidavit must be regarded as deliberate. (Sobel's testimony that he believed the Management Agreement had been submitted along with the motion is unsupported by the record. Tr. 303.) " . . . [D]eliberate failures to produce information can result in disqualification for lack of candor." Garden State Broadcasting Limited Partnership v. FCC, 996 F.2d 386, 393 (D.C. Cir. 1993). (Emphasis in the original.)

75. We also reject Sobel's attempt to rely on advice of counsel. Although the affidavit was originally drafted by their attorneys, Brown & Schwaninger (Tr. 154), Sobel and Kay acknowledge that Sobel reviewed the affidavit, discussed it with Kay, and understood that he could correct or supplement it. Tr. 140-41, 156, 161, 371. We find that he could appreciate its nature. Advice of counsel does not excuse a clear breach of duty by a licensee. See RKO General, Inc. v. FCC, 670 F.2d at 231.[6] Moreover, we note that in the December 4, 1994 letter to Gary Stanford, which Sobel composed himself (Tr. 158), Sobel adopted a similar line. He assured Stanford that he was an "Independent Two Way Radio Dealer." WTB Exh. 46 at 1 (Emphasis in the original). We find wholly unpersuasive his attempt to justify this statement in the context of the Management Agreement stations. He testified: "I made a deal with [Kay], but that does not make us dependent on each other. I am an independent radio dealer." Tr. 159. Sobel, however,

[6] Because Sobel was personally involved in the representations and fully aware of counsel's conduct, his reliance on Rainbow Broadcasting Co., FCC 98-85 (Aug. 5, 1998), as set forth in Sobel's Further Motion for Leave to File Supplement [to] Exceptions is unavailing.

ignores the obvious implication of his representation that his stations are operated and/or marketed independently of Kay, which they are not. For example, in the Stanford letter, Sobel specifically asserted: "I advertise under my own company name in the Yellow pages." WTB Exh. 46 at 1. The Management Agreement stations are, however, marketed under Kay's name, not Sobel's. Although the Management Agreement was subsequently disclosed during discovery in the Kay proceeding, Sobel did not disclose it in his correspondence with Stanford, even though disclosure would have served to clarify Sobel's relationship with Kay. We believe this matter is relevant to the designated issue because it confirms the existence of a pattern of conduct. See Ismail v. Cohen, 706 F. Supp. 243, 252-53 (S.D.N.Y. 1989); Fed. R. Evid. 404(b).[7]

VI. SANCTIONS

76. The ALJ concluded that Sobel was unfit to remain a Commission licensee. 12 FCC Rcd at 22902 ¶ 78, 22903 ¶ 80. He found that Sobel transferred control of the Management Agreement stations without authorization, made misrepresentations, and lacked candor about the transfer of control. He deemed Sobel's misconduct willful and repeated. He found that Sobel cannot be relied on to be forthcoming with the Commission and to comply with rules and policies. He therefore revoked Sobel's licenses, denied his applications, and dismissed his finder's preference requests.

77. In their exceptions, Sobel and Kay argue that disqualification is not appropriate on the facts of this case. Sobel observes that he has no past record of misconduct. Sobel and Kay deny that any misrepresentation or lack of candor occurred here and claim that the Commission does not customarily disqualify licensees for an unauthorized transfer of control unaccompanied by dishonesty. Kay suggests that if any sanction is appropriate it should be a forfeiture. Sobel urges that any disqualification should be limited to the Management Agreement stations.

78. The Bureau fully supports the ALJ. It argues that revocation of the Management Agreement stations is an insufficient sanction because they have not been profitable for Sobel.

79. We have found that Sobel violated 47 U.S.C. § 310(d) by transferring control of the Management Agreement stations without Commission authorization and that Sobel lacked candor about the status of these stations. An unauthorized transfer of control accompanied by deception reflects serious misconduct implicating a licensee's most basic obligations. In the past, we have disqualified licensees who have committed this combination of misconduct. See Deer Lodge Broadcasting, Inc., 86 FCC 2d 1066, 1097 n.164 (1981).

[7] As to another matter, however, we accord no significance. The record shows that Kay prepared responses to application return notices on Sobel's behalf. Tr. 87-88. On customer invoices attached to responses, the name of Kay's business, "Lucky's Two-Way Radios," is blacked out. Id.; WTB Exhs. 19-23. However, Kay, not Sobel, took the initiative in marking out the information. Tr. 337-39. The record does not indicate that, at that time in 1993, Sobel was aware that the deleted information might be of a detrimental nature.

80. In specifying the appropriate sanction here, we are mindful that the misconduct found did not affect all of Sobel's licensed facilities, but only the Management Agreement stations (i.e., Sobel's conventional SMR stations on the 800 MHz band). The record indicates that Sobel has operated land mobile stations, including his facilities on the 450 MHz and 470-512 MHz bands, for over 20 years without any evidence of misconduct. The record here gives no indication that Sobel failed to exercise appropriate control over these facilities or that he lacked candor in any representation made about them. Thus, the question arises whether the sanctions imposed here should extend to the uninvolved stations. In this regard, deterrence is an important element of the character qualifications process. See Character Qualifications, 102 FCC 2d 1179, 1128 ¶ 103 (1986). Sanctions imposed on licensees may deter future misconduct by the person involved and by others. In the context of broadcasting, we observed that: "Suffering the loss of one station, with the costs thereby imposed will likely serve to deter all but the most unrepentant from serious future misconduct." Id. In this case, we find that loss of Sobel's interests involving the 800 MHz band alone will be an adequate deterrent. We will therefore revoke Sobel's licenses for facilities on the 800 MHz band, deny his pending 800 MHz applications, and dismiss his finder's preference requests for such facilities. In light of these sanctions, we find it unnecessary to impose a forfeiture against Sobel. We will direct the Bureau to process Sobel's remaining applications.

VII. ORDERING CLAUSES

81. ACCORDINGLY, IT IS ORDERED, That, the Petition to Defer and Consolidate Consideration, filed March 2, 1999, by Marc D. Sobel; and the Supplement to Petition to Defer and Consolidate Consideration, filed March 2, 1999, by Marc D. Sobel ARE DISMISSED as moot.

82. IT IS FURTHER ORDERED, That, because oral argument would not materially assist the Commission in the resolution of this proceeding, the Requests for Oral Argument, filed January 12, 1998, by James A. Kay, Jr. and January 29, 1998, by Marc D. Sobel d/b/a Air Wave Communications ARE DENIED.

83. IT IS FURTHER ORDERED, That, Wireless Telecommunications Bureau's Reply Brief, having been timely served by mail before January 27, 1998, the Joint Motion to Strike [the reply brief as untimely], filed January 29, 1998 by Marc D. Sobel d/b/a Air Wave Communications and James A. Kay, Jr. IS DENIED.

84. IT IS FURTHER ORDERED, That the Motion for Leave to File Supplement to Consolidated Brief and Exceptions, filed May 28, 1998, and the Further Motion for Leave to File Supplement [to] Exceptions, filed October 2, 1998, by Marc D. Sobel d/b/a Air Wave Communications ARE GRANTED in part and, because further briefing would not materially assist the Commission, ARE DENIED in part.

85. IT IS FURTHER ORDERED, That, the Consolidated Brief and Exceptions, filed by Marc D. Sobel d/b/a Air Wave Communications, and James A. Kay, Jr.'s Consolidated Brief and Exceptions to the Initial Decision of Administrative Law Judge John M. Frysiak, both filed January 12, 1998, ARE GRANTED in part and ARE

DENIED in part, and the Initial Decision of Administrative Law Judge John M. Frysiak, FCC 97D-13 (Nov. 28, 1997) (12 FCC Rcd 22879) IS MODIFIED as set forth above.

86. IT IS FURTHER ORDERED, That the following licenses of Marc D. Sobel and/or Marc D. Sobel d/b/a Air Wave Communications ARE REVOKED: KNBT299, KRU576, WNWB334, WNXL471, WNYR424, WNZS492, WPAD685, WPCA891, WPCZ354, WPDB603, WPFF529, WPFH460, WPCG780, WNPY680, WNZC764.

87. IT IS FURTHER ORDERED, That the following applications of Marc D. Sobel and/or Marc D. Sobel d/b/a Air Wave Communications ARE DENIED: File Nos. 670861, 697577, 501542, 666673, 614567.

88. IT IS FURTHER ORDERED, That the following requests for finder's preferences of Marc D. Sobel and/or Marc D. Sobel d/b/a Air Wave Communications ARE DISMISSED: 93F600, 93F622, 93F683, 93F758, 93F323.

89. IT IS FURTHER ORDERED, That the Wireless Telecommunications Bureau IS DIRECTED to proceed with the processing of Sobel's other pending applications.

90. IT IS FURTHER ORDERED, That the licensee IS AUTHORIZED to continue operation of the stations mentioned in paragraph 86 until 12:01 A.M. on the ninety-first day following the release date of this decision to enable the licensee to conclude the stations' affairs; PROVIDED, HOWEVER, that if the licensee seeks reconsideration or judicial review of our action revoking its license, it is authorized to operate the stations until final disposition of all administrative and/or judicial appeals.

91. IT IS FURTHER ORDERED, That the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

CONSOLIDATED SEPARATE STATEMENT OF COMMISSIONER KEVIN J . MARTIN, CONCURRING IN PART AND DISSENTING IN PART

Re: *James A. Kay, Jr., Licensee of One Hundred Fifty Two Part 90 Licenses in the Los Angeles, California Area*, Decision, WT Docket No. 94-147;
Marc Sobel and Marc Sobel d/b/a Air Wave Communications, Licensee of Certain Part 90 Stations in the Los Angeles Area, Decision, WT Docket No. 97-56

I dissent in large part from this item. I am unwilling to approve, based on the conflicting and confusing record before us, the determination that James A. Kay, Jr. improperly failed to respond to requests for information and that Kay and Marc Sobel lacked candor in filings they made to the Commission. In the information request decision, the Commission reverses an ALJ's explicit findings that Kay acted reasonably in the face of a demanding inquiry by the Bureau – findings that are ordinarily accorded great deference. In the lack of candor decision, upon which two ALJs reached opposite conclusions, the Commission essentially sides with the first ALJ, even though he did not have accurate information on all of the relevant facts. In my view, the Commission does itself a disservice by making these decisions on the cold record before it. At the very least, the Commission should have referred this proceeding to a new ALJ to reconcile the conflicting decisions and make definitive findings.

I. Failure To Respond to Commission Inquiries

This case began as an investigation into whether Kay was falsely reporting the number of mobile units he served in order to avoid certain channel sharing and recovery rules. Having received several complaints making such allegations, the Wireless Bureau served Kay with a request for information. A lengthy exchange ensued, in which Kay and the Bureau wrestled over what information Kay would provide and when he would provide it. Kay's actions during the course of this exchange are the basis for the Commission's determination that Kay improperly failed to respond to the Bureau's inquiries in violation of 47 U.S.C. § 308(b) and 47 C.F.R. § 1.17.

The Commission makes this determination in the face of a contrary decision and express findings by the ALJ. That ALJ, Judge Chachkin, found that "the Bureau was engaged in a fishing expedition with the hope that something would turn up," that "Kay was being asked to provide virtually every detail regarding the operation of his business[,] . . . include[ing] sensitive information such as his entire customer list and details regarding the technical configuration of each of his customers' system[s]," and that "all of Kay's reasonable requests for modification of the extremely broad inquiry were arbitrarily ignored." *James A. Kay, Jr., Licensee of One Hundred Fifty Two Part 90 Licenses in the Los Angeles, California Area*, Initial Decision of Chief Administrative Law Judge Joseph Chachkin, WT Docket No. 94-147, FCC 99D-04, ¶ 179 ("*Chachkin Decision*"). In addition, Judge Chachkin found that the Bureau's request for information "was received by Kay only two weeks after the Northridge earthquake, a devastating natural disaster that did substantial damage to his business and personal residence" and that, ultimately, "Kay

turned over some 36,000 documents." *Id.* ¶ 180. Finally, Judge Chachkin ruled that Kay's actions were based on "legitimate concerns in Kay's mind whether the data sought would be kept confidential" (*id.* ¶ 181), because, among other things, Kay's competitors had received a copy of the Bureau's inquiry letter to Kay (*id.* ¶ 29) and the Bureau at one point demanded 50 copies of Kay's response (*id.* ¶ 181).

In my view, the Commission goes too far in reversing Judge Chachkin's conclusions. There can be no question that Kay and the Bureau were engaged in a heated dispute. Judge Chachkin made a number of factual determinations to resolve that dispute and determine that Kay did not violate the statute or Commission rules. In such situations, I am reluctant to reverse an ALJ's determinations based on a cold record. It is well established that, generally, the initial trier of fact is "closer to the course of the litigation," *Bonds v. District of Columbia*, 93 F.3d 801, 808 (D.C. Cir. 1996), and "has a better 'feel' . . . for the litigation" than a reviewing tribunal, *Founding Church of Scientology v. Webster*, 802 F.2d 1448, 1457 (D.C. Cir. 1986). Thus, the Commission routinely defers to the ALJ on these sorts of decisions. *See, e.g.*, *Applications of WWOR-TV, Inc. for Renewal of License of Station WWOR(TV), Secaucus, New Jersey and Garden State Broadcasting Limited Partnership for Construction Permit, Secaucus, New Jersey*, Memorandum Opinion and Order, 5 FCC Rcd 4113, ¶ 11 (1990) ("[W]e are reluctant to reverse the ALJ, to whom broad discretion is ceded in ordering discovery . . . ."); *Applications of Mid-Ohio/Capitol Communications Limited Partnership et al. for Construction Permit for a New FM station on Channel 298A in Columbus, Ohio*, Memorandum Opinion and Order, 4 FCC Rcd 8125, ¶ 6 (1989) ("[T]he Commission routinely entrusts the determination of the scope of such discovery in comparative hearings to the broad discretion of the ALJ."). Indeed, this principle of deference extends well beyond the FCC; in the similar arena of discovery disputes, appellate tribunals traditionally afford great deference to the decisions of the trial court. *See, e.g.*, *United States v. Davis*, 244 F.3d 666, 670 (8th Cir. 2001) ("The district court has broad discretion in imposing sanctions on parties for failing to comply with discovery orders."); *accord Bonds*, 93 F.3d at 807. Accordingly, on this record, I would not have reversed the ALJ's decision.

II. Lack of Candor

The Commission's lack of candor decisions against Kay and Sobel stem from other events in this case. During the course of the Bureau's investigation of Kay, it received information indicating that Kay may have conducted business under several other people's names, including Marc Sobel's. The Commission thus included Sobel's licenses in the order designating Kay's licenses for hearing. Kay filed a motion to remove Sobel's licenses from the hearing designation and attached an affidavit signed by Sobel stating that Kay had no interest in any of Sobel's stations. Based on this submission, the Commission removed Sobel's licenses from the Kay proceeding.

The Bureau subsequently discovered that Kay operated a number of Sobel's stations pursuant to a management agreement. Accordingly, the Commission designated Sobel's licenses for hearing, asking whether Sobel had engaged in misrepresentation or

lack of candor. The ALJ assigned to Sobel's case, Judge Frysiak, concluded that Sobel's actions showed a lack of candor. Judge Frysiak based that determination on, among other things, statements in the affidavit and on Sobel's apparent failure to provide the Bureau the management agreement in a timely manner.

However, Judge Chachkin, in *later* reviewing the same conduct in Kay's case, came to the opposite conclusion. Judge Chachkin found that Kay understood the affidavit's statement that Kay had no interest in any of Sobel's stations to mean that Kay had no ownership interest in any licenses that were issued to Sobel. *Chachkin Decision* ¶ 216. Judge Chachkin determined that "Kay was specifically advised, by counsel, that . . . the management agreement did not constitute an interest." *Id.* ¶ 172. He thus concluded that "Kay's testimony as to what he meant by the word 'interest' and the phrase 'stations or licenses' is entirely reasonable and credible." *Id.* ¶ 216.

Judge Chachkin also found that Kay's and Sobel's actions showed no intent to deceive the Bureau or conceal the management agreement. He pointed out that Kay and Sobel provided the management agreement to the Bureau just two months after they filed the challenged motion and accompanying affidavit, long before anyone raised any questions about lack of candor. *Id.* ¶ 217.

Finally, Judge Chachkin addressed Judge Frysiak's prior decision on the lack of candor issue and concluded that Judge Frysiak had been misled by the Bureau. Judge Chachkin explained that, although Kay had provided the Bureau a copy of the management agreement in March of 1995, the Bureau represented to Judge Frysiak that no copy was provided until late 1996. *Id.* ¶ 210. "There is no doubt," Judge Chachkin concluded, "that [Judge Frysiak's] ultimate conclusion that 'Sobel made misrepresentations and lacked candor . . .' was based on his erroneous assumption as to when the Agreement was given to the Bureau." *Id.* ¶ 210.

Based on these conflicting decisions and on Judge Chachkin's view that Judge Frysiak was misled, I cannot support this decision. As the Commission acknowledges, determinations of credibility must rest in large part on factual determinations made by an ALJ. I am unable, on the record before us, to reconcile the ALJ's conflicting decisions and determine that Judge Frysiak was not misled.[1] Particularly given the severity of the sanctions at issue, I would not find that Kay and Sobel lacked candor.

[1] I also take issue with the Commission's conclusion that Judge Frysiak would not have made a different decision had he known Kay and Sobel provided the Bureau a copy of the management agreement in March of 1995, long before lack of candor was an issue. Judge Frysiak's decision explicitly rests in part on the determination that "even though the Management Agreement fully disclosed their relationship, Sobel did not voluntarily submit it to the Commission until requested by the Commission to do so in [1996]." *Marc Sobel and Marc Sobel d/b/a Air Wave Communications, Licensee of Certain Part 90 Stations in the Los Angeles Area*, Decision, WT Docket No. 97-56, FCC 97D-13, ¶ 74. While this may not have been the largest factor in Judge Frysiak's decision, I find it impossible to assess its impact after the fact. I do not understand how my colleagues, on the record before us, can make such a conclusion on Judge Frysiak's state of mind.

III. Conclusion

At best, this is a case of conflicting opinions by ALJs that ought to be remanded to a third ALJ to reconcile their determinations. Even worse, however, this case involves allegations that Commission staff misled a judge into reaching an erroneous conclusion. While I am confident that Commission staff engaged in no misconduct in this case, we do them a disservice by depriving them of an opportunity, in a new hearing, to explain what occurred. Such a hearing would defend the reputation of our staff and ensure the integrity of our process. Thus, for all of these reasons, the more reasonable course would be to refer this case for a hearing in front of a new ALJ. Accordingly, I dissent from parts IV, VII, VIII, and IX of the Kay Order and from parts V, VI, and VII of the Sobel Order. I concur with respect to the other parts of these Orders.